

State of Colorado



Bill Owens
Governor

John Zakhem
Board Chair

Kristin F. Rozansky
Board Director

State Personnel Board
633 17th Street, Suite 1320
Denver, Colorado 80202-3604
Phone (303) 866-3300
Fax (303) 866-5038

AGENDA PUBLIC BOARD MEETING December 19, 2006

A public meeting of the State Personnel Board will be held on **Tuesday, December 19, 2006, at the Colorado State Personnel Board, 633 17th Street, Suite 1400, Courtroom 1, Denver, Colorado 80202-3604.** The public meeting will commence at 9:00 a.m.

Reasonable accommodation will be provided **upon request** for persons with disabilities. If you are a person with a disability who requires an accommodation to participate in this meeting, please notify Board staff at 303-866-3300 by December 13, 2006.

I. REQUESTS FOR RESIDENCY WAIVERS

A. December 1, 2006 Report on Residency Waivers

Reports are informational only; no action is required.

II. PENDING MATTERS

A. Cases on Remand

1. Barbara Clementi v. Department of Corrections, State Personnel Board case number 2003B159, Court of Appeals Case No. 05CA0577.

Complainant, a community corrections parole officer, appealed the abolishment of her position and offer of retention rights. After hearing, the Administrative Law Judge (ALJ) determined that Respondent's layoff of Complainant was contrary to rule and law in that Respondent violated the layoff statute by failing to consider seniority in total state service and performance evaluations in implementing the May 2003 reduction in force and in abolishing Complainant's position. The ALJ ordered that Respondent's action is rescinded, making Complainant's reinstatement to her position retroactive to July 1, 2003; that Respondent pay Complainant's attorney fees and costs; and that Respondent reimburse Complainant for travel costs incurred due to the illegal layoff.

Following Respondent's appeal of the Initial Decision of the Administrative Law Judge, on March 3, 2005, the Board voted to reject Conclusion of Law No. 1 ("Respondent's layoff of Complainant was arbitrary and capricious and contrary to rule and law"); Conclusion of Law No. 2 ("Complainant is entitled to an award of attorney fees and costs"); and Findings of Fact which include determinations that Respondent failed to comply with applicable state law and Board rules in making its decisions with regard to Complainant, including: 11, 12, 13, 14, 19, 20,

21, 22, 25, 40, 41, 43, 46, 47, 48, 49, and 50. The Board also voted to adopt Conclusion of Law No. 3 ("Respondent is not entitled to an award of attorney fees and costs") and the remaining Findings of Fact not listed above.

On March 17, 2005, Complainant filed a Notice of Appeal with the Court of Appeals. On September 21, 2006, the Colorado Court of Appeals issued its "Order Reversed and Case Remanded with Directions," finding that the Board erred in reversing the ALJ's award of attorney fees and costs to Complainant and that the Board's actions in holding that the seventeen factual findings of the ALJ were not adopted and then making its own conclusion with nothing in the record to support it were arbitrary and capricious. The court reversed the Board's order and remanded the case to the Board for implementation of the ALJ's award of attorney fees and costs to Complainant.

On November 20, 2006, the Mandate of the Court of Appeals was issued.

B. Pending Motions

1. Timothy Bennett v. Department of Corrections, State Personnel Board case number 2003B150(C).

On October 17, 2006, the Board voted to adopt the ALJ's Findings of Fact and the remedy awarded to Complainant, with regards to the abolishment of his position.

In addition, the Board remanded the matter to the ALJ to hold an evidentiary hearing on two issues: the amount of attorney fees to be awarded to Complainant for litigating the abolishment of his position and the appropriate amount of the pay reduction in Complainant's base pay imposed as a result of the August 8, 2003 disciplinary action. The Board voted to reject the Administrative Law Judge's modification of Respondent's imposition of a permanent monthly \$300 reduction of the Complainant's base salary, determining that the reduction of \$1800 total over a six-month period is not sufficient given the record before the Board. The Board also found that the permanent reduction on Complainant's base pay as imposed by Respondent was excessive given the record before the Board and directed the ALJ to make written findings of fact and enter an order regarding the monetary award as to the two issues outlined above. Finally, the Board ordered that the October 17, 2006 order was not final agency action by the Board, as the issue regarding the amount of the disciplinary action had not yet been determined by the Board.

On November 16, 2006, Complainant filed a Motion for Entry of Final Judgment/Order Certification Re: Illegal Abolition of Position. Respondent filed an Objection to Motion for Entry of Final Judgment on November 27, 2006. On December 1, 2006, Complainant filed his Motion for Permission to File a Reply to Objection to Motion for Entry of Final Judgment and his Reply to Objection to Motion for Entry of Final Judgment.

2. Patrick Ward v. Department of Natural Resources, State Personnel Board case number 2004B143.

On February 2, 2006, the ALJ issued her Initial Decision of the Administrative Law Judge. On June 22, 2006, the Board issued its Order, remanding the matter to the Administrative Law Judge solely for legal analysis regarding the fifth prong of the test for a *prima facie* case of discrimination based on a disability, as enunciated in *Community Hospital v. Fail*, 969 P.2d 667 (Colo. 1998), including, if

necessary, holding an evidentiary hearing and reopening discovery. On July 20, 2006, the ALJ issued the Initial Decision of the Administrative Law Judge, on Remand. On November 29, 2006, the Board issued its order, adopting the findings of fact and conclusions of law in the Initial Decision of the Administrative Law Judge, on Remand, and making the Initial Decision of the Administrative Law Judge, on Remand an order of the Board. On December 4, 2006, Respondent filed a Motion for Stay Pending Appeal.

III. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES ON APPEAL TO THE STATE PERSONNEL BOARD

A. Lynn Redden and William Kaberlein v. Department of Labor and Employment, Unemployment Insurance and Department of Personnel and Administration, State Personnel Board case number 2005G094(C).

Complainants appealed the selection process utilized by Respondent for filling multiple vacancies for the Labor and Employment Specialist III (L & E III) position, seeking an order invalidating the promotions (with the exception of the number 3 ranked candidate) and mandating that Respondent conduct the selection process again, in accordance with the Rule of Three as set forth in the Colorado Constitution, article XII, §13(5), and C.R.S. §24-50-112.5(b)(2). After hearing, the ALJ concluded that Respondent violated the Colorado Constitution, article XII, §13(5), and §24-50-112.5(2)(b), C.R.S.; Respondent violated former Director's Procedure P-4-17; and Respondent's action was arbitrary and capricious. Rescinding Respondent's actions, the ALJ ordered that Respondent shall invalidate the promotions of the nine individuals promoted to L & E III (with the exception of the promotion of the candidate who ranked #3); Respondent shall make the remaining selections to the L & E III positions from the January 2005 referral list based on the three highest ranking for each position; the first selection shall be made from the top three ranked individuals on the referral list (#1, #2, and #4); and for each additional selection, the next highest ranking individual's name (#5) will be referred to the appointing authority, until all selections have been made.

On July 6, 2006, the ALJ issued the Initial Decision of the Administrative Law Judge.

Pre and Post ID Procedural History: On November 10, 2005, the Department of Personnel and Administration's Motion to Limit the Issue at Hearing or, in the Alternative, to Intervene was filed. On December 7, 2005, the ALJ issued her Consolidation Order: Procedural Order Regarding Motion to Intervene. On March 8, 2006, the Department of Personnel and Administration's Supplemental Status Report and Renewed Motion to Dismiss the Department of Personnel and Administration was filed. On March 21, 2006, the ALJ issued her Order Granting Renewed Motion to Dismiss Department of Personnel and Administration as a Party. Following the filing of a notice of appeal of the ALJ's Initial Decision by Respondent on August 4, 2006, the Department of Personnel and Administration, on October 16, 2006, filed its Motion for Leave to File Brief of Amicus Curiae Department of Personnel and Administration and Brief of Amicus Curiae Department of Personnel and Administration. Respondent's Brief on Appeal was also filed on October 16, 2006. On October 23, 2006, Complainants filed Complainants' Objection to Department of Personnel's Motion for Leave to File Brief of Amicus Curiae. On October 30, 2006, Complainants filed Complainants' Request for Oral Argument and Complainants' Answer Brief on Appeal. On November 2, 2006, Complainants filed Complainants' Answer Brief in Response to Department of Personnel's Amicus Curiae Brief. On November 6, 2006, Respondent's Reply to Complainants' Answer Brief was filed.

IV. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES TO GRANT OR DENY PETITIONS FOR HEARING

- A. Clarence White III v. Department of Human Services, Division of Aging and Adult Services, State Personnel Board case number 2006G056.

Complainant, a Program Specialist employed by the Department of Human Services, Division of Aging and Adult Services, filed a petition for hearing on March 8, 2006, challenging the termination of his employment during the probationary period. Complainant asserts that Respondent discriminated against him by failing to investigate a complaint by a security guard who is biased towards Complainant, by failing to exhibit understanding and appreciation of individual differences, by failing to investigate the issue of Complainant's tardiness during a scheduled on-site evaluation, and by refusing to accept Complainant's arrangements with the bank regarding his overdue state credit card account, despite the serious financial hardship created by the 30-day timeline imposed by his appointing authority.

Respondent argues that Complainant was terminated during his probationary period for unsatisfactory performance, and he has not suffered a deprivation as defined by the Colorado Anti-Discrimination Act because he has failed to prove a *prima facie* case of race discrimination and because Respondent terminated him for legitimate business reasons, and not as a pretext for discrimination.

On November 28, 2006, the Administrative Law Judge issued a Preliminary Recommendation recommending that Complainant's petition for hearing be denied.

- B. Steven L. Akers v. Department of Law, Attorney General's Office, State Personnel Board case number 2005G045(C).

Complainant, a certified Human Resources Director employed by the Department of Law, filed petitions for hearing in November and December 2004, and May and August 2005. Complainant alleges that in response to complaints about discriminatory conduct, Respondent has retaliated against him by creating a hostile work environment and through the imposition of an April 2005 corrective action.

Respondent asserts that it did not discriminate against Complainant, and that much of the requested relief has been rendered moot by the retirement of the supervisor that was the subject of his claims.

On December 5, 2006, the Administrative Law Judge issued a Preliminary Recommendation recommending that Complainant's petition for hearing be denied.

V. INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES

- A. Dale R. Myers v. Department of Personnel and Administration, Division of Information Technologies, Network/Communications Services, State Personnel Board case number 2006B079 (November 24, 2006).

Complainant, a Telecom/Electronic Specialist III, appealed his termination, seeking reinstatement, back pay and benefits, attorney fees and costs, and reimbursement for uninsured medical expenses. After hearing, the ALJ determined that Complainant committed only one of the three acts for which he was terminated, although his employment was terminated for yelling and pointing at his supervisor and for being insubordinate to his supervisors, both violations of a corrective action, and for engaging in outside employment by changing a light bulb at the top of a radio tower without prior approval, the act which the ALJ found Complainant committed. Rescinding the termination and reinstating Complainant's employment with full back pay, benefits and statutory interest, the ALJ concluded that Respondent's action was arbitrary, capricious,

or contrary to rule or law, except when Respondent found that Complainant had violated secondary employment rules as to the KGIW tower work; the discipline imposed was not within the range of reasonable alternatives; attorney fees are not warranted; and Complainant is not entitled to reimbursement of medical expenses.

- B. Fred Sailas v. Regents of the University of Colorado, University of Colorado at Denver and Health Science Center, Office of Laboratory Animal Resources/Center for Laboratory Animal Care, State Personnel Board case number 2006B109 (November 30, 2006).

Complainant, a research animal attendant, appealed his termination, seeking reinstatement, back pay and benefits, and attorney fees and costs. After hearing, the ALJ determined that Complainant committed the act alleged, as he pled guilty in federal court to one felony count of Unlawful Possession of a Destructive Device. However, the ALJ also found that Respondent's decision to terminate him was arbitrary, capricious, or contrary to rule or law because: (1) state law prohibits the discipline of an employee solely because of conviction of a felony or other offense involving moral turpitude, as the conviction must also adversely affect the employee's performance or the department; and (2) Respondent's decision to terminate Complainant because of a felony conviction which was fundamentally unrelated to his employment was based upon conclusions that reasonable men fairly and honestly considering the evidence would not reach. Rescinding the termination and reinstating Complainant with back pay, benefits, and interest, the ALJ also concluded that the discipline imposed was not within the range of reasonable alternatives and attorney fees are not warranted.

VI. REVIEW OF THE MINUTES FROM THE NOVEMBER 21, 2006 PUBLIC MEETING OF THE STATE PERSONNEL BOARD

VII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS NOVEMBER 21, 2006 PUBLIC MEETING:

- A. Patrick Ward v. Department of Natural Resources, Division of Wildlife, State Personnel Board case number 2004B143.

The Board voted to adopt the findings of fact and conclusions of law in the Initial Decision of the Administrative Law Judge on Remand and to make the Initial Decision of the Administrative Law Judge on Remand an Order of the Board.

- B. Larry Steve Martinez v. Department of Human Services, Division of Youth Corrections, Lookout Mountain Service Center, State Personnel Board case number 2006G055.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and to deny the petition for hearing.

- C. Diane Luck v. Department of Public Health and Environment, Laboratory Services Division, State Personnel Board case number 2007G014.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and to deny the petition for hearing.

- D. Jeff Anthony v. Department of Revenue, Division of Motor Vehicle License Administration, State Personnel Board case number 2007G006.

The Board voted to reject the Preliminary Recommendation of the Administrative Law Judge and to grant the petition for hearing.

- E. Wendy Pierzina, Anthony Wilk and Yvonne Jiron v. Regents of the University of Colorado, University of Colorado at Boulder, Wardenburg Health Center, State Personnel Board case number 2007G009(C).

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and to deny the petition for hearing, considering that Complainants' grievance issues concerning plans for reorganization or layoffs, or which allege violations of the Board rules for reorganization, layoffs and retention rights, have been dismissed from the case without prejudice to refilling at a later date.

VIII. REPORT OF THE STATE PERSONNEL DIRECTOR

IX. ADMINISTRATIVE MATTERS & COMMENTS

A. ADMINISTRATIVE MATTERS

- Year-to-date Budget Report - Jennifer Okes, Chief Financial Officer for the Department of Personnel and Administration
- Cases on Appeal to the Board and to Appellate Courts

B. OTHER BOARD BUSINESS

- Staff Activities

C. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS, PERSONNEL ADMINISTRATORS, AND THE PUBLIC

XI. EXECUTIVE SESSION

- A. Case Status Report
- B. Minutes of the October 17, 2006 Executive Session
- C. Other Business

* * *

NEXT REGULARLY SCHEDULED BOARD MEETINGS - 9:00 a.m.

January 16, 2007	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
February 20, 2007	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
March 20, 2007	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
April 17, 2007	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
May 15, 2007	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
June 19, 2007	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604

